

THE HONORABLE RONALD B. LEIGHTON

U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

NICOLE and GUY MAEL, NADINE VIGLIANO,
BRITNEY MOREA, CAROL CONWAY, ANGELA
BERTUCCI and TINA WIEPERT, on behalf of
themselves and all others similarly situated,

Plaintiffs,

vs.

EVANGER'S DOG AND CAT FOOD
CO., INC., NUTRIPACK, LLC, AGAINST THE GRAIN
PET FOODS, and SHER SERVICES COMPANY
INCORPORATED,

Defendants.

EVANGER'S DOG AND CAT FOOD CO., INC.,

Counterclaimant,

vs.

NICOLE MAEL,

Counterdefendant.

NO. 3:17-cv-05469-RBL

**PLAINTIFFS' MOTION FOR FINAL
APPROVAL OF CLASS ACTION
SETTLEMENT**

**Hearing Set on Motion Calendar:
June 12, 2020, 9:30 a.m.**

PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION
SETTLEMENT

CASE NO. 3:17-CV-05469-RBL

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I. INTRODUCTION

Plaintiffs Nicole and Guy Mael, Nadine Vigliano, Britney Morea, Angela Bertucci and Tina Wiefert request the Court grant final approval of the class action Settlement that they reached with Defendants Evanger's Dog and Cat Food Co., Inc. ("Evanger's"), Nutripack, L.L.C., Against the Grain Pet Foods, and Sher Services, Co. Plaintiffs and their counsel believe the Settlement—which requires Defendants to pay \$545,000, to continue testing its pet food, and to change its business practices, including its advertising—is fair, adequate, and reasonable, and in the best interests of the Settlement Class.¹

The Settlement is an excellent result for the Settlement Class. The non-reversionary Settlement Fund will be used to provide substantial refunds to Settlement Class Members whose product purchases were verified or who incurred approved costs associated with veterinarian bills from pets that experienced illness related to pentobarbital poisoning after consuming the recalled pet foods. Indeed, now that the claims period has concluded, the parties have determined the Net Settlement Fund is sufficient to pay 100% of all approved veterinarian bills and cash refunds of 100% to all verified purchasers. The Settlement also provides that Claimants who have no proof of purchase are entitled to three cans of Defendants' pet food, which the parties agree can be mailed directly to Claimants instead of providing product certificates. Finally, the Settlement requires Defendants to significantly change their business practices. For two years, Defendants must subject their Hand-Packed Products to random independent third-party testing, at their own expense up to \$5,000 per year, every three months for two years. And Defendants agreed to stop labeling their pet food as "human grade," unless they verify their compliance with FDA requirements.

Because the requirements of Federal Rules of Civil Procedure 23(e) and (h) are satisfied, Plaintiffs request the Court grant final approval of the Settlement by: (1) approving

¹ Unless otherwise defined, capitalized terms have the same meaning as ascribed to them in the Settlement Agreement. Dkt. No. 116-1 (Settlement Agreement).

1 the Settlement Agreement; (2) determining that adequate notice was provided to the
 2 Settlement Class; (3) finally certifying the Settlement Class; (4) granting Class Counsel
 3 \$295,000 in attorneys' fees and costs; and (5) approving service awards for the Class
 4 Representatives not to exceed \$2,500 each.

5 **II. STATEMENT OF FACTS**

6 **A. Factual and procedural background.**

7 Plaintiffs brought this class action alleging they paid a premium price for meat-based
 8 pet foods based on Defendants' advertising of their pet foods as "human grade," produced in
 9 USDA-inspected facilities or with USDA-inspected meats, and "people food for pets." Plaintiffs
 10 further allege that three of Defendants' products produced during the class period were
 11 eventually recalled because they contained pentobarbital (the "Recalled Products") that
 12 injured some of Plaintiffs' pets and caused the death of one. Dkt. No. 31 at p. 1.

13 Defendants moved to dismiss twice and the parties engaged in an early mediation with
 14 the Honorable Peter D. Lichtman (Ret.), which was not successful. After Defendants' motions
 15 to dismiss were denied, the parties engaged in substantial discovery, including responding to
 16 each other's written discovery and exchanging documents. Dkt. No. 116 ¶ 11–14. Plaintiffs
 17 also served third-party subpoenas and made freedom of information act requests. By the time
 18 the parties agreed to resume settlement talks—this time with Magistrate Judge Creatura—
 19 Plaintiffs had analyzed approximately 40,000 pages of documents. *Id.* ¶ 13.

20 The parties participated in three in-person mediation sessions with Judge Creatura. *Id.*
 21 ¶ 15. After the third mediation session, the parties actively continued their negotiations with
 22 Judge Creatura's assistance and agreed to the final terms of the Settlement on October 18,
 23 2019. *Id.* ¶ 9; *see also* Dkt. No. 116-1 (Settlement Agreement).

24 On October 24, 2019, the Court entered an order preliminarily approving the class
 25 action Settlement. Dkt. No. 120. The Court entered an amended order the next day. Dkt. No.
 26 121. Plaintiffs refer to this amended order as the Preliminary Approval Order.
 27

B. The notice program was successful.

After the Court granted preliminary approval of the Settlement, the Settlement Administrator, CPT Group, commenced the notice program. *See* Declaration of Ani S. Sarich.² The notice program included direct notice by email to any person identified in Evanger's records as having purchased the Recalled Products during the class period. Online retailers Amazon.com, Chewy.com, and PetFlow also identified consumers who purchased the Recalled Products during the class period and email notice was sent to those consumers as well. Evanger's emailed the notice to consumers who purchased the products through Evanger's and PetFlow's websites. *See* Sarich Decl. Amazon.com and Chewy.com emailed notice to consumers who purchased the Recalled Products through their respective websites. *See* Declaration of Sara Rawson; Declaration of Roberto Wong.

Collectively, CPT Group, Amazon.com, and Chewy.com sent the notice by email to 4,489 Class Members. Sarich Decl. ¶¶ 20, 22; Rawson Decl. ¶ 4; Wong Decl. ¶ 4. All of the email notices sent by Amazon.com and Chewy.com were delivered successfully. Rawson Decl. ¶ 4; Wong Decl. ¶ 4. Of the 333 email notices CPT Group sent, just nine bounced. Sarich Decl. ¶¶ 20, 22. CPT Group conducted a National Change of Address search on those individuals and sent Notice Postcards by U.S. Mail; there are no undeliverable Summary Notice Postcards. *Id.* ¶¶ 23-25. The direct notice program therefore reached 100% of the individuals for whom the parties had contact information.

In addition to direct notice, CPT Group implemented an online media notice effort that included digital banner advertisements designed to reach the target audience by serving a total of 23,759,492 gross ad impressions. *Id.* ¶ 14. This digital media program was designed to reach 87% of the target audience with direct notification reaching approximately 1% of the target audience, for a total reach of 87.9%. *Id.* ¶ 17-18. And it was successful. *Id.* ¶ 18. CPT

² CPT Group also mailed all required notices under the Class Action Fairness Act. Sarich Decl. ¶ 4.

1 Group reports that it received 52,977 clicks on these banner advertisements, which then
2 redirected the consumer to the Settlement Website. *Id.* ¶ 15.

3 CPT Group established both a toll-free telephone number and a case-specific email
4 address through which members of the Settlement Class could obtain the Notice, including
5 information about the claims process. Sarich Decl. ¶¶ 9-10. CPT Group also established a case
6 website where Settlement Class Members could access relevant documents and submit
7 claims. *Id.* ¶ 11-12. CPT Group received 118 calls to the case telephone support line,
8 responded to 114 emails submissions, and the Settlement Website received more than
9 166,092 views. *Id.* ¶¶ 9-12.

10 The deadline for submitting claims was April 8, 2019. A total of 5,581 Settlement Class
11 members submitted claims. Sarich Decl. ¶ 29. As of May 22, 2020, 151 claims had been
12 approved for reimbursement of cash purchases totaling over \$39,567. *Id.* ¶¶ 38-39. CPT
13 Group also received 4,353 claims from households (representing 4,691 claimants) who did not
14 provide proof of purchase. *Id.* ¶ 29. Each of these households is entitled to receive three cans
15 of Evanger's dog food. The estimated value of the three cans is \$8.10. Declaration of Jennifer
16 Rust Murray in Support of Final Approval ("Murray Final Approval Decl.") ¶ 2. CPT Group also
17 received forty claims for reimbursement of veterinary bills. Five of these claims, totaling
18 \$8,332.81, were approved. *Id.* ¶¶ 34-36. CPT Group received 20 claims it has identified as
19 deficient and is still processing. *Id.* ¶ 32. CPT Group will file a supplemental declaration once
20 the deficiencies have been resolved.

21 The deadline for opting out of or objecting to the Settlement was also April 8, 2019. No
22 Settlement Class Members have objected and one person submitted an untimely opt-out
23 request that CPT Group denied. *Id.* ¶¶ 26-28.

24 **C. The Settlement Fund will provide complete relief to all Claimants.**

25 The Settlement requires Defendants to establish a non-reversionary Settlement Fund
26 of \$545,500 to pay Settlement Class Members' approved veterinary expenses, make cash
27

1 payments to Settlement Class Members who purchased the Recalled Products and opt for a
 2 cash payment; and to pay settlement administration costs, attorneys' fees and litigation
 3 expenses, and service awards to Plaintiffs approved by the Court. Settlement Agreement
 4 §§ 1.36, 2.2. If approved by the Court, these amounts include \$150,000 for Settlement
 5 Administration Costs, \$295,000 for attorneys' fees and costs, and service awards of \$2,500 to
 6 each Plaintiff. *Id.* §§ 1.7; *see also* Dkt. No. 127 (Plaintiffs' Motion for Attorneys' Fees, Costs
 7 and Service Awards).

8 Now that the claims period has closed, the parties have determined the Settlement
 9 Fund can provide more relief to Settlement Class Members than bargained for, subject to the
 10 Court's approval.

- 11 1. The Net Settlement Fund covers 100% of all claims for approved veterinary
 12 expenses.

13 Pursuant to the Settlement Agreement, Settlement Class Members whose pets got sick
 14 after eating the Recalled Products and who submitted a claim are entitled to receive an award
 15 for their verified veterinary expenses. Settlement Agreement §§ 2.2(f), 2.4(a). CPT received 40
 16 requests for reimbursement of veterinary expenses. Sarich Decl. ¶ 34. The parties met and
 17 conferred regarding these claims and jointly agreed to accept five requests. *Id.* ¶ 35. Three
 18 requests were sent to a neutral veterinarian retained by the parties for further review, none
 19 of which were approved. *Id.* The remaining 32 were denied due to no verifiable proof of
 20 purchase and/or no supporting documentation from a veterinarian demonstrating illness
 21 related to pentobarbital poisoning. *Id.*

22 The total value of the five accepted out-of-pocket requests is \$8,332.81. *Id.* ¶ 36. All of
 23 these requests will be paid in full from the Settlement Fund.

- 24 2. The Net Settlement Fund is sufficient to pay all Settlement Class Members in
 25 cash for 100% of their verified product purchases.

26 Settlement Class Members who purchased Recalled Products online could file claims
 27 electing to receive a check in the amount of 25% of their purchases or a product certificate for

50% of their purchase amount. *Id.* §§ 2.2(d), (e), 2.3, 2.4(b). The Settlement Agreement further provides that if any funds remain after paying these amounts, the remaining funds will be distributed to Settlement Class Members proportionally based on the total amount of their verified purchases up to 100%. *Id.* § 2.4(b)(ii). As of May 22, 2020, CPT Group approved 151 claims for reimbursement of product purchases. Sarich Decl. ¶ 37.

The parties have determined the Settlement Fund is sufficient to pay all 151 claims in cash for 100% of their verified purchases, totaling \$39,567.57. Sarich Decl. ¶ 39. No Settlement Class Members will need to be paid in product certificates. If approved by the Court, Class Counsel will notify the Claimants who requested product certificates that they will be paid in cash. Murray Final Approval Decl. ¶ 3.

3. The Net Settlement Fund is sufficient to cover the costs of direct mailing of pet food to Claimants who had no proof of purchase and who would otherwise receive product certificates.

The Settlement provides that Claimants who have no proof of purchase are entitled to a certificate that allows them to obtain at no cost three cans of Evanger's or Against the Grain products from a retailer. Settlement Agreement § 2.3(b).

In light of Covid-19 and the stay at home orders in effect across the country, the parties request the Court approve direct mailing of the products valued at \$8.10 to approximately 4,353 households (representing 4,691 Claimants), instead of providing Claimants with product certificates they would have to redeem in person. The Net Settlement Fund is sufficient to cover these mailing costs and will allow Claimants to obtain the benefits of the Settlement while staying safe at home. Murray Final Approval Decl. ¶ 3. Defendants will provide the Court with a declaration confirming the shipments occurred and substantiating any shipping costs. *Id.* ¶ 4.

D. No Settlement funds will revert to Defendants.

If any funds remain after allocation of the cash awards set forth above and the funding of the direct product mailings, the remaining amounts shall be distributed in *cy pres* to the

1 North Shore Animal League of America. Settlement Agreement § 2.4(b)(iv). A “*cy pres* remedy
 2 must account for the nature of the plaintiffs’ lawsuit, the objectives of the underlying statutes,
 3 and the interests of the silent class members” *Lane v. Facebook, Inc.*, 696 F.3d 811, 820-21
 4 (9th Cir. 2012) (citation omitted). North Shore Animal League America satisfies these criteria
 5 because it operates no-kill animal shelters across the country.

6 **E. The Settlement requires Defendants to change their business practices.**

7 Defendants have also agreed to significant non-monetary relief, designed to protect all
 8 Settlement Class Members and remediate the alleged false and misleading advertising cited in
 9 the Action. Defendants (i) will only use the term “human grade” in their advertising if they
 10 comply with the voluntary criteria established by the Association of American Feed Control
 11 Officials (“AAFCO”); (ii) will no longer use the phrase “people food for pets”; (iii) will no longer
 12 produce videos showing people eating their pet foods; (iv) will inform their retailers by letter
 13 of this Settlement and these advertising restrictions; (v) will provide Plaintiffs’ counsel with a
 14 letter confirming compliance with all FDA requirements regarding supplier and ingredient
 15 safety for any of their Hand Packed Products; and (vi) will subject their Hand Packed Products
 16 to random independent third-party testing, at their own expense of up to \$5,000 per year,
 17 every three months for the next two years. Settlement Agreement § 2.1. One month after the
 18 Final Settlement Date, Defendants will also file a verification with the Court affirming their
 19 compliance with these and other Settlement terms. *Id.* § 2.1(f).

20 **III. AUTHORITY AND ARGUMENT**

21 Under Rule 23(e)(2), the Court may approve a class action settlement “only after a
 22 hearing and only on finding that it is fair, reasonable, and adequate” after considering
 23 whether:

- 24 (A) the class representative and class counsel have adequately
- 25 represented the class;
- 26 (B) the proposal was negotiated at arm’s length;
- 27

1 (C) the relief provided for the class is adequate, taking into
2 account:

- 3 (i) the costs, risks, and delay of trial and appeal;
- 4 (ii) the effectiveness of any proposed method of
5 distributing relief to the class, including the method of
6 processing class member claims;
- 7 (iii) the terms of any proposed award of attorney's fees,
8 including timing of payment; and
- 9 (iv) any agreement required to be identified under Rule
10 23(e)(3); and

11 (D) the proposal treats class members equitably relative to each
12 other.

13 The amendment to Rule 23 adopting these factors took effect on December 1, 2018,
14 so there is no binding authority addressing them yet. But the factors are largely consistent
15 with those previously identified by the Ninth Circuit as guides to determining whether a
16 proposed settlement is fair, adequate, and reasonable. The factors previously discussed by the
17 Ninth Circuit are: (1) the strength of the plaintiff's case; (2) the risk, expense, complexity, and
18 likely duration of further litigation; (3) the risk of maintaining class action status throughout
19 the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the
20 stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a
21 governmental participant; and (8) the reaction of the class members to the proposed
22 settlement. *See Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575–76 (9th Cir. 2004). The
23 Ninth Circuit has characterized these factors as “guideposts” and explained that “[d]eciding
24 whether a settlement is fair” is “best left to the district judge who can develop a firsthand
25 grasp of the claims, the class, the evidence, and the course of the proceedings—the whole
26 gestalt of the case.” *In re Volkswagen “Clean Diesel” Mktg., Sales Practices, & Prods. Liab.*
27 *Litig.*, 895 F.3d 597, 611 (9th Cir. 2018).

A. Plaintiffs and Class Counsel have adequately represented the class.

The Court previously found that Plaintiffs have no conflicts of interest with the other Settlement Class Members and have demonstrated their commitment to the class by actively participating in the litigation. Dkt. No. 121 at 3:21-25. Nothing has changed. Plaintiffs and Class Counsel have continued to vigorously represent the class and have no conflicts of interest with any Class Members. Each of the Class Representatives responded to interrogatories and requests for production, and they also assisted in drafting the complaints and review of other motions and briefs throughout the litigation. Dkt. No. 116 ¶ 14; Dkt. No. 129 ¶¶ 11-18.

B. The Settlement is the result of arm's-length, non-collusive negotiations.

The parties negotiated the Settlement at arm's length, during several months of settlement negotiations that included three in-person mediation sessions with a member of this Court. "[O]ne may take a settlement amount as good evidence of the maximum available if one can assume that parties of equal knowledge and negotiating skill agreed upon the figure through arms-length bargaining." *Ortiz v. Fiberboard Corp.*, 527 U.S. 815, 852 (1999). The negotiations were conducted with the assistance of Magistrate Judge Creatura, an experienced judge and mediator, who facilitated the in-person mediations and the negotiations that followed. Fed. R. Civ. P. 23(e)(2) advisory committee's note to 2018 amendment ("the involvement of a neutral or court-affiliated mediator or facilitator in [settlement] negotiations may bear on whether they were conducted in a manner that would protect and further the class interests").

Class Counsel negotiated the Settlement with the benefit of many years of prior experience and a solid understanding of the facts and law of this case. See Dkt. Nos. 116 and 117. Class Counsel have extensive experience litigating and settling class actions, including consumer protection and false labeling claims in particular. *Id.* They believe the Settlement is

1 fair, reasonable, adequate, and in the best interests of the Settlement Class as a whole. See
 2 Dkt. No. 116 ¶ 16; Dkt. No. 117 ¶ 16.

3 The Ninth Circuit has identified “red flags” that may suggest that plaintiffs’ counsel
 4 allowed pursuit of their own self-interest to infect settlement negotiations, including when
 5 counsel receive a disproportionate portion of the settlement, the parties agree to a “clear
 6 sailing” arrangement providing for the payment of attorneys’ fees separate and apart from
 7 the class funds, or the parties agree that any fees not awarded will revert to defendants
 8 rather than be added to the class fund. *In re Hyundai and Kia Fuel Econ. Litig.*, 926 F.3d 539,
 9 569 (9th Cir. 2019). None are present here. Because Class Counsel will be paid from the same
 10 Settlement Fund as Settlement Class Members, they were incentivized to negotiate the
 11 largest fund possible. None of the Settlement Fund will revert to Defendants; any requested
 12 fees or Service Awards not approved by the Court will be distributed to Settlement Class
 13 Members. Settlement Agreement § 2.7.

14 **C. The relief provided for the Class is adequate.**

15 In determining whether the relief provided to the Settlement Class is adequate, courts
 16 must balance the strength of the plaintiff’s case against the risk, expense, complexity, and
 17 likely duration of further litigation. See *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934,
 18 944 (9th Cir. 2015). Here, Defendants’ agreement to pay \$545,500 to settle this case is more
 19 than adequate given the risks and delay of continued litigation.

- 20 1. The relief provided by the Settlement is adequate in light of the costs, risks, and
 21 delay of trial and appeal.

22 The parties have been litigating this action for nearly three years and have sufficient
 23 information to make an informed decision with respect to the Settlement. Dkt. No. 116 ¶¶ 9–
 24 15; Dkt. No. 117 ¶¶ 3–5. Before reaching agreement on a settlement, both parties responded
 25 to interrogatories and requests for production. Dkt. No. 116 ¶ 12. Through these discovery
 26 requests, Plaintiffs obtained and analyzed approximately 40,000 pages of documents,
 27

1 including sales data, ingredient lists, FDA reports, product testing reports, communications
 2 with consumers, and inspection data for Defendants' products and facilities. *Id.* Plaintiffs had
 3 engaged in sufficient discovery to assess the strength of their claims and the risks of continued
 4 litigation. As a result, "the parties had enough information to make an informed decision
 5 about the strength of their cases and the wisdom of settlement." *Rinky Dink, Inc. v. World Bus.*
 6 *Lenders*, No. C14-0268-JCC, 2016 WL 3087073, at *3 (W.D. Wash. May 31, 2016).

7 The monetary benefits of the Settlement alone, which provide for 100% of actual
 8 damages for Settlement Class Members with verified veterinary expenses and product
 9 purchases, exceed similar settlements approved by other courts. *See, e.g. In re Pet Food*
 10 *Prods. Liab. Litig.*, Case No. 07-2867 (NLH), 2011 WL 1322878, at *3 (D. N.J. April 5, 2011)
 11 (approving class action settlement of \$250,000 in mislabeled and contaminated pet food case
 12 where product purchase claimants received 43.6% of their estimated actual damages); *Rawa*
 13 *v. Monsanto Co.*, 934 F.3d 862, 866 (8th Cir. 2019) (affirming district court's approval of class
 14 action settlement providing claimants with a 50% refund for mislabeled products); *Retta v.*
 15 *Millenium Prods., Inc., et al.*, Case Nos. CV-15-1801 PSG AJWx, CV-16-3780 PSG AJWx, 2017
 16 WL 5479637, at *5 (C.D. Cal. Aug. 22, 2017) (approving class action settlement providing
 17 approximately 21% of the estimated potential recovery). Indeed, the Settlement Fund will be
 18 able to provide more monetary relief to Claimants than the parties anticipated—all Claimants
 19 with verified veterinary expenses will be reimbursed for 100% of those costs and, instead of
 20 providing verified product purchaser Claimants with either 25% of their product purchases in
 21 cash or a product certificate for 50% of their purchase amount, the Settlement Fund will
 22 refund all approved product purchasers 100% in cash. *See* Murray Decl. ¶ 3; *see also*
 23 Settlement Agreement § 2.4(b)(ii) (providing remaining funds "will be distributed to
 24 Settlement Class Members proportionally based on the total amount of their verified
 25 purchases up to 100%."). In addition to these monetary benefits, approximately 4,353
 26 households whose purchases were not verified will receive three cans of dog food valued at
 27

1 \$8.10, which the parties can mail directly to Claimants with the Court's approval. *See* Murray
 2 Decl. ¶¶ 2-3.

3 The Settlement also provides benefits to all Settlement Class Members in the form of
 4 significant injunctive relief that requires Defendants to stop representing that their products
 5 are "People Food for Pets," cease using the term "human grade" unless they comply with
 6 independent standards and guidelines for use of the term, submit to additional testing on
 7 several specific pet food products, and verify their compliance with FDA requirements
 8 regarding supplier and ingredient safety for the products bought by Settlement Class
 9 Members. Settlement Agreement § 2.1.

10 Plaintiffs have been confident in the merits of their case, but are well aware that
 11 litigation can be unpredictable and that Defendants intended to aggressively pursue defenses
 12 available to them. Moreover, Plaintiffs still had several hurdles to clear before resolution
 13 through further litigation, including additional discovery, class certification, dispositive
 14 motions likely to be filed by both parties, and ultimately trial and any appeal that followed.
 15 And even assuming Plaintiffs successfully certified the class, Defendants could have moved to
 16 decertify or appeal after trial. Plaintiffs therefore faced the ongoing risk that individual
 17 Settlement Class Members would have filed their own lawsuits or that any payments to the
 18 Settlement Class would be substantially delayed by appeals.

19 Litigating this case to trial and through any appeals would be expensive and time-
 20 consuming and would present risks to both parties. The Settlement, by contrast, provides
 21 prompt and certain relief for Settlement Class Members. *See Rodriguez v. West Publ'g Corp.*,
 22 563 F.3d 948, 966 (9th Cir. 2009).

- 23 2. Approved Claimants will receive cash payments reimbursing them for 100% of
 24 their veterinary expenses and product purchases, and Claimants who had no
 25 proof of purchase will receive direct mailing of products.

26 Rule 23(e)(2)(C)(ii) requires consideration of the effectiveness of any proposed method
 27 of distributing relief to the class, including the method of processing class-member claims.

1 The Settlement Agreement provides that Settlement Class Members whose pets got a
 2 pentobarbital related illness after eating the Recalled Products and who submitted a claim are
 3 entitled to receive an award for their approved veterinary expenses. Settlement Agreement
 4 §§ 2.2(f), 2.4(a). The five Settlement Class Members with verified veterinary expenses will be
 5 mailed a check reimbursing them for 100% of their vet bills, totaling \$8,332.81. Sarich Decl.
 6 ¶¶ 34-36.

7 Settlement Class Members who purchased Recalled Products online could file claims
 8 electing to receive a check in the amount of 25% of their purchases or a product certificate for
 9 50% of their purchase amount. *Id.* §§ 2.2(d), (e), 2.3, 2.4(b). The Settlement Agreement
 10 further provides that if any funds remain after paying these amounts, the remaining funds will
 11 be distributed to Settlement Class Members proportionally based on the total amount of their
 12 verified purchases up to 100%. *Id.* § 2.4(b)(ii). The parties have determined the remaining
 13 funds should be sufficient to pay all 151 Settlement Class Members who purchased Recalled
 14 Products online in cash for 100% of their verified purchases, totaling \$39,567. Sarich Decl.
 15 ¶ 39. No Settlement Class Members will need to be paid in product certificates. If approved by
 16 the Court, Class Counsel will notify the Claimants who requested product certificates that they
 17 will be paid in cash. Murray Final Approval Decl. ¶ 3.

18 Finally, the Settlement provides that Claimants who have no proof of purchase are
 19 entitled to a certificate that allows them to obtain at no cost three cans of Evanger's or
 20 Against the Grain products from a retailer. Settlement Agreement § 2.3(b). In light of Covid-19
 21 and the stay at home orders in effect across the country, however, the parties request that
 22 the Court permit Evanger's to mail the three cans of product directly to the 4,353 Claimants
 23 whose claims lack proof of purchase. The total value of the products to the Class is \$35,259
 24 (\$8.10 x 4,353 households). The Net Settlement Fund should be sufficient to cover these
 25 mailing costs and will allow Claimants to obtain the benefits of the Settlement while staying
 26 safe at home. Murray Final Approval Decl. ¶ 4.
 27

3. Class Counsel seek an award of attorneys' fees that represents a fraction of their total lodestar, which will be paid only after final approval.

Under Rule 23(e)(2)(C)(iii) the Court should consider "the terms of any proposed award of attorney's fees, including timing of payment." The Settlement Agreement provides that attorneys' fees and costs shall be paid from the Settlement Fund in an amount approved by the Court. Settlement Agreement § 2.6.

Class Counsel seek a fee award of \$295,000, which is approximately 29% of Class Counsel's total lodestar of more than \$1 million. See Dkt. No. 127, p. 2 n.1. The requested fee award also includes costs. Class Counsel do not seek a separate award of the more than \$28,440 in out-of-pocket costs they incurred prosecuting this action. When costs are considered, Class Counsel seek a fee award of \$266,560 ($\$295,000 - \$28,440 = \$266,560$), which is less than 27% of their total lodestar ($\$266,560 / \$1,009,017 = .264$). Courts generally use the lodestar method to award fees under statutes like Washington's Consumer Protection Act and the other consumer protection statutes at issue, which provide for fee shifting. See, e.g., *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990) (explaining that "statutory awards of attorneys' fees are subject to 'lodestar' calculation procedures"); RCW 19.86.090 (providing for recovery of "actual damages sustained... together with the costs of the suit, including a reasonable attorneys' fee"); and see 815 Ill. Comp. Stat. 505/10a (providing that a successful plaintiff may obtain an award of attorneys' fees); 73 Pa. Stat. § 201-9.2(a) (providing for recovery of "actual damages or one hundred dollars (\$100), whichever is greater" and that the court may also award to the plaintiff "costs and reasonable attorney fees"); N.J. Stat. Ann. § 56:8-19 (providing for an award of "reasonable attorneys' fees, filing fees and reasonable costs of suit"); N.Y. Gen. Bus. Law § 349 (providing for "reasonable attorney's fees to a prevailing plaintiff"). The lodestar-multiplier method confirms the propriety of the requested fee here as set forth in Plaintiffs' Motion for Attorneys' Fees, Costs and Service Awards. See Dkt. No. 127.

1 In addition, fees will be paid only after the Settlement is finally approved by the Court,
 2 the time for any appeal has elapsed, or any appeal has been resolved, and the Settlement has
 3 taken effect. And the Settlement Agreement contains no “clear sailing” provision. *See Allen v.*
 4 *Bedolla*, 787 F.3d 1218, 1224 (9th Cir. 2015) (a clear sailing provision is “an arrangement
 5 where defendant will not object to a certain fee request by class counsel.”). Though free to do
 6 so, no Class Member has objected to the award sought by Class Counsel.

7 **D. The Settlement treats Class Members equitably relative to each other.**

8 Under Rule 23(e)(2)(D), the Court must consider whether the Settlement Agreement
 9 treats Settlement Class Members equitably relative to each other. Each Settlement Class
 10 Member’s share will be based on his or her actual damages. Settlement Class Members with
 11 verified product purchases will be reimbursed for 100% of their actual damages, while
 12 Settlement Class Members without proof of purchase will receive products instead of cash.
 13 Settlement Agreement §§ 2.2-2.3. This settlement structure mirrors structures approved as
 14 fair and reasonable in prior food mislabeling cases. *See, e.g., Retta*, 2107 WL 5479637
 15 (approving settlement fund from which class members could claim differing amounts in either
 16 cash or product vouchers based on whether they could provide proof of purchase); *In re*
 17 *Volkswagen “Clean Diesel” Mktg., Sales Practices, & Prods. Liab. Litig.*, 895 F.3d 597, 607–609
 18 (9th Cir. 2018) (affirming certification of settlement class and final approval of settlement
 19 where settlement class members with weaker claims likely benefitted from inclusion in a class
 20 with members who had stronger claims); *Gehrich v. Chase Bank USA, N.A.*, 316 F.R.D. 215, 225
 21 (N.D. Ill. 2015) (when some class members have stronger claims than others, it is appropriate
 22 to provide larger settlement awards to those class members.). Similarly, any Settlement Class
 23 Members whose pets may have required veterinary care due to illness related to
 24 pentobarbital poisoning experienced additional damages as a result of Defendants’ failure to
 25 honor their marketing promises, and it is therefore fair and reasonable to allow them to claim
 26 additional compensation from the Settlement Fund.
 27

E. The Court-ordered Notice Program is constitutionally sound.

Rule 23(e)(1) requires the Court to “direct notice in a reasonable manner to all class members who would be bound by” a proposed settlement. Fed. R. Civ. P. 23(e)(1). Class members are entitled to the “best notice that is practicable under the circumstances” of any proposed settlement before it is finally approved by the Court. Fed. R. Civ. P. 23(c)(2)(B). To comply with due process, notice must be “the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.” *Amchem Prods. v. Windsor*, 521 U.S. 591, 617 (1997).

The Preliminary Approval Order directed that email notice be sent to known members of the Class. Preliminary Approval Order ¶¶ 13-17. The Settlement Administrator, Amazon.com, and Chewy.com completed the Notice Plan as directed, including completing advanced address searches for Settlement Class Members whose emails bounced or were undeliverable, followed by mailing of a postcard notice. Sarich Decl. ¶¶ 15-20; Rawson Decl. ¶ 4; Wong Decl. ¶ 4. Direct notice reached 100% of the known Settlement Class Members for whom the parties had contact information. Sarich Decl. ¶¶ 19-25; Rawson Decl. ¶ 4; Wong Decl. ¶ 4; *cf. Roes v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1046-57 (9th Cir. 2019) (due process requires identifying additional means of notice reasonably calculated to reach class members whose notices were undeliverable)

In addition, CPT Group established and maintained a publicly available website containing documents relevant to the Settlement and responses to frequently asked questions and provided a toll-free telephone number and email address Settlement Class Members could use to contact the Administrator. Sarich Decl. ¶¶ 9-12; Rawson Decl. ¶ 4; Wong Decl. ¶ 4. CPT received 118 calls and 114 emails and tracked more than 166,092 views of the Settlement Website. Sarich Decl. ¶¶ 9-12.

CPT Group also implemented a 10-week programmatic digital banner advertising campaign on the Google Display Network, general programmatic ad exchanges, as well as ad

placements on the following social media platforms: Facebook Audience Exchange Ad Network, Instagram, and Twitter. Sarich Decl. ¶¶ 14-18. This was designed to reach Settlement Class members for whom the parties did not have contact information. CPT Group estimates that the direct notice combined with the online media program reached 87.9% of the Class. *Id.* ¶ 17. The notice program satisfied Rule 23 requirements and due process.

F. The Settlement Class should be finally certified.

In its Preliminary Approval Order, the Court conditionally certified the Settlement Class under Federal Rule of Civil Procedure 23(a) and (b)(3). Dkt. No. 121 ¶¶ 1-4. Nothing has changed. The requirements of both Rule 23(a) and (b)(3) remain satisfied. For all of the reasons set forth in the Court's Preliminary Approval Order, Dkt. No. 121, and Plaintiffs' motion to approve notice to the Settlement Class, Dkt. No. 115 at 9-13, the Court should finally certify the Settlement Class.

G. Class Counsel's requested fees and the Class Representatives' requested service awards should be approved.

Not one Settlement Class Member objected to Class Counsel's request for reasonable attorneys' fees, and service awards to Class Representatives, Guy Mael, Nicole Mael, Nadine Vigliano, Britney Morea, Angela Bertucci and Tina Wiepert. For all the reasons set forth in Plaintiffs' Motion for Attorneys' Fees, Costs and Service Awards, Dkt. No. 127, Class Counsel respectfully request that the Court award (1) Class Counsel \$295,000 in attorneys' fees and costs; and (2) Class Representative service awards in the amount of \$2,500 each in recognition of their service to the Settlement Class.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request the Court enter an Order (1) approving the Settlement Agreement; (2) determining that adequate notice was provided to the Settlement Class; (3) finally certifying the Settlement Class; (4) granting Class Counsel an

1 attorneys' fees and costs award of \$295,000; and (5) approving service awards in the amount
2 of \$2,500 to each Class Representative.

3 RESPECTFULLY SUBMITTED AND DATED this 22nd day of May, 2020.

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5
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CERTIFICATE OF SERVICE

I, Jennifer Rust Murray, hereby certify that on May 22, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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